IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

APPEAL FROM ORDER NO.1108 OF 1999

Walha Ganpat Tadge, since deceased)
by his legal heirs :)

1) Chandrabhagabai Walmik Tadge)
Age 65 yrs., Occ.: Agril.)
Tal.Chalisgaon (Jalgaon).)

2) Mirabai Vasant Tadge, Age 35 yrs.)
Occ.: Agril., R/o. Pimpalgaon)
Tal.Chalisgaon (Jalgaon))

3) Suman Kisan Kakad, Age 48 yrs.,)
R/o.Bejgaon, Tal.: Nandgaon)
Dist.: Nashik.)

4) Jijabai Kashinath Avad, Age 45)
Occ.: Household, R/o. Palashi)
Tal.: Nandgaon (Nashik))

5) Mirabai Dattatraya Katkade)
Age 35, Occ.: Household, R/o 4197)
Govardhan Bhuvan, Panchavati)
Nashik.)

6) Ratnabai Madhukar Sanap, Age 31 yrs.)
Occ.: Household, R/o.: Lasalgaon)
Tal.: Niphad, Dist.: Nashik.)

7) Shakuntala Prakash Sonawane)
Age 30 yrs., Occ.: Household)
R/o Lasalgaon, Tal.: Niphad)
Dist.: Nashik.)

8) Kantabai Ramdas Lodhe, Age 26 yrs.,)
Occ.: Household, R/o. Pimpalvad)
Tal.: Chalisgaon (Jalgaon)).. Appellants
(Org.Plaintiffs)

Versus

Ramchandra Bala Sangale)
Age about 70 yrs., Occ.: Agril.)
R/o. Jalgaon Budruk, Tal.: Nandgaon)
Dist.: Nashik.).. Respondent
(Org.Defendant)

Mr.P.N.Joshi for the Appellants.

Mr.M.M.Sathaye for the Respondent.

CORAM: SMT.NISHITA MHATRE, J.

JUDGMENT RESERVED ON : 12TH OCTOBER 2004

JUDGMENT PRONOUNCED ON : 1ST DECEMBER 2004

JUDGMENT :

. The order challenged in this Appeal directs a remand to the trial Court for a decision on the issue as to whether the Defendant proves that he had become the owner of the suit lands by adverse possession.

2. The deceased Plaintiff purchased the suit lands for a consideration of Rs.10,000/- under a registered sale deed dated 20th February 1969. The Plaintiff was put in possession of the suit property under the sale deed itself. The land was acquired for the Girnar Dam project and the Plaintiff then shifted to another village. It appears that the Plaintiff's son expired after a prolonged illness and the Plaintiff himself has also expired during the pendency of the Suit. It appears that the Defendant admitted the sale transaction but put up various inconsistent pleas in the Written Statement. The trial Court after a consideration of the pleadings and the evidence before it, decreed the Suit and the Defendant was directed to hand over vacant possession of the suit land at Jalgaon within one month of the date of the order i.e. from 11th December 1990. The trial Court has come to the conclusion that the

Defendant had been changing his version from time to time and that his pleadings were contrary to each other though pleaded in the alternative. The trial court has observed that the Defendant had raised two inconsistent pleas, namely, (i) that he was a tenant and (ii) that he was an owner by adverse possession. However, it appears that these pleas were not pressed by the Defendant and the trial Court has recorded that they were not for consideration before it since the first plea regarding tenancy was deleted and the second plea regarding adverse possession was abandoned at the stage of hearing. Being aggrieved by the order of the trial Court, Defendant preferred an Appeal before the Additional District Judge at Malegaon, District Nashik. The Appellate Authority set aside the decree since it accepted the submission made by the Defendant that the issue relating to adverse possession of the Defendant over the suit land had not been framed. It is this order, which directs the trial Court to decide the issue as to whether the Defendant proved that he had become an owner by way of adverse possession, which has been impugned in this Appeal From Order.

3. Mr.Joshi appearing for the Appellant i.e. the Plaintiff submits that when plea has been abandoned by the Respondent-Defendant, it could not have framed the same issue for decision of the trial Court. He submits that the plea regarding adverse possession must be

specific and it must indicate as to when the possession became adverse so that the starting point of limitation can be determined. He relies on the judgment of the Apex Court in the case of *S.M.Karim* vs. *Mst.Bibi Sakina*, **AIR 1964 SC 1254** and judgment of this Court in the case of *Byramjee Jeejeebhoy Private Limited* vs. *Govindbhai Appaji Bhatte and others*, **1994 (1) BCR 211**. According to the learned Advocate, there was no need for the parties to have been sent back to the trial Court when parties went to trial with knowledge that a particular question was in issue even though no specific issue regarding that plea has been framed. He places reliance on the judgments in the case of *Bhairab Chandra Nandan* vs. *Ranadhir Chandra Dutta*, **AIR 1988 SC 396** and *Nedunuri Kameswaramma* vs. *Sampati Subha Rao*, **AIR 1963 SC 884**. He urges, by placing reliance on the judgment in *N.Jayaram Reddy and another* vs. *Revenue Divisional Officer and Land Acquisition Officer, Kurnool*, **(1979) 3 SCC 578**, that when the Defendant had wilfully abandoned the plea regarding adverse possession, he could not be permitted to raise that plea again to the prejudice of the Plaintiff. He points out that when the issues were framed, it was always open for the Defendant to request the trial Court to frame an additional issue under Order 14 Rule 5 of the Civil Procedure Code. According to the learned Advocate, this procedure not having been followed by the Defendant, the Plaintiff could not be prejudiced so as to defeat his rights. The learned

Advocate then submits that the Suit was filed in 1980 and remanded in 1999. According to him, there was no need to put the clock back after such a long time had lapsed. He places reliance on the judgment of the Apex Court in *State of Punjab and another* vs. *Gram Panchayat and others*, **AIR 2002 SC 1365** and *Ram Singh* vs. *State of U.P.*, **1970 (3) SCC 683**. He further submits that the Defendant ought not to be given the opportunity to fill the lacuna in his evidence after a period of twenty years. In any event, according to the learned Advocate, evidence with regard to adverse possession ought to have been available to the Defendant and agitated by him before the trial Court. This issue cannot be re-opened in the appellate stage. He places reliance on the judgment in the case of *Koyappathodi M.Ayisha Umma* vs. *State of Kerala*, **AIR 1991 SC 2027**.

4. As against this, Mr.Sathaye for the Respondent-Defendant, submits that the Appeal From Order itself is not maintainable by placing reliance on the judgment in the case of *Narayanan* vs. *Kumaran and others*, **(2004) 4 SCC 26**. He submits that the Appellant-Plaintiff herein is not entitled to agitate the question of fact in an appeal under order 43 rule 1. According to the learned Advocate, this Court should confine itself to such facts or conclusions which have a bearing on the order of remand. The learned Advocate also submits that a plea raised by a party cannot be equated with an issue raised

for adjudication. He submits that it was necessary for the trial Court to frame the issue regarding adverse possession since the Defendant in its Written Statement had specifically stated in paragraph 8 that he was in possession of the suit premises for more than twelve years before the filing of the Suit. The learned Advocate then submits that the issue regarding possession goes to the root of the matter and the trial Court ought to have therefore framed an issue as to whether the Plaintiff had ceased to be in possession of the suit land on account of the Defendant being in adverse possession. Mr.Sathaye also submits that no prejudice would be caused to the Plaintiff if the matter is remanded as both parties would have an opportunity to lead evidence afresh on the issue which is to be decided by the trial Court. He submits that since no substantial question of law has been raised in the present Appeal From Order, it should be dismissed.

5. In the present case, the trial Court has come to a categorical conclusion that the issue regarding tenancy was deleted. The trial Court has also in clear terms found that the plea regarding adverse possession had been abandoned by the Respondent-Defendant and, therefore, no issue with regard to adverse possession was framed. Could the Defendant be permitted to raise the same plea and to complain at the appellate stage regarding non-framing of an issue pertaining to adverse

possession ?

6. As rightly pointed out by Mr.Joshi for the Appellant, when the issues were framed by the trial Court, it was always open for the Defendant to request the Court under Order 14 Rule 5 to frame additional issues. Such an application was not made by the Defendant at any point of time. Obviously, therefore, the Defendant was not really interested in pursuing the plea relating to adverse possession.

7. Furthermore, the parties have gone to trial with full knowledge that the question regarding adverse possession was in issue though a specific issue had not been framed. The Apex Court in *Bhairab Chandra Nandan* (supra) and *Sampati Subba Rao* (supra) has expressed the view that a matter could not be remanded for trial, afresh, on any particular issue if the parties have proceeded with the trial knowing fully well the scope of the trial. In *Bhairab Chandra Nandan* (supra), the Apex Court considered whether a matter should be remanded when no issue was framed in the trial Court regarding availability of the alternate accommodation. The Apex Court held that though no issue was formally framed, the parties went to trial and adduced evidence with this issue in mind and have drawn the attention of the Court to the existence of another house belonging to the Appellant in that case which was not vacant. In such

circumstances, the Apex Court held that there was no need to remand the matter for a finding on the question whether another suitable alternate accommodation was available to the Appellant. In the present case, the trial Court has specifically considered the fact that the plea of adverse possession was abandoned. Obviously, therefore, no issue regarding adverse possession was framed. However, the trial Court has come to the conclusion that under the agreement and under the sale deed, the Plaintiff was entitled to possession of the suit land and that the Defendant had taken forcible possession of the suit lands. It was always open for the Defendant to produce evidence on record to establish that he was in continuous possession of the suit lands for a period of twelve years and that the Plaintiff was not in possession of the suit land in view of the Defendant acquiring it by way of adverse possession.

8. Besides a bald statement made by the Defendant in the Written Statement that he has been in possession of the suit land for over a period of twelve years continuously, there is nothing on record to show when the possession became adverse in order that the Court be able to determine the starting point of limitation. In the case of *S.M.Karim* (supra), the Apex Court has held thus :

> "... Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse, if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea. ..."

This view has been reiterated by the Apex Court in the case of *Ajit Chopra* vs. *Sadhu Ram and others*, **AIR 2000 SC 212**. In the present case, although a plea had been raised in the Written Statement that the Defendant was in adverse possession of the suit lands, the Defendant has not cared to bring on record since which period he has been in adverse possession. The plea raised is absolutely vague.

9. In my view, the learned Advocate for the Plaintiff has rightly submitted that the plea which was wilfully abandoned by a party at the relevant time could not be allowed to be raised at the convenience of that party, to the prejudice of another. This view has been taken by the Apex Court in the case *N.Jayaram Reddy* (supra). The trial Court had given its decision on the issues raised before it and therefore could not be faulted for not having framed the issue regarding adverse possession if the plea of adverse possession was abandoned by the Defendant.

10. Mr.Sathaye places reliance on the case of *Narayanan* (supra) to submit that an appeal will lie from an order of remand only in those cases in which an appeal would lie against the decree if the appellate court instead of making an order of remand had passed a decree on the strength of the adjudication on which the order of remand was passed. He submits that this Court while deciding the appeal should desist from going into the excruciating details regarding the facts involved in the case. According to the learned Advocate, the Appellant in an appeal under Order 43 Rule 1 clause (u) is not entitled to agitate questions of fact. The question involved in the present case is whether a plea which was once abandoned can be raised before the Appellate Court and whether a remand can be directed on this abandoned plea. In my view, the Appellate Court was wholly in error in remanding the matter to the trial Court to decide this issue of adverse possession especially after such a long period of time. It is obvious that the impugned order would not only enable the Defendant to plug the lacunae in his evidence but also to protract the litigation.

11. The Appeal From Order is, therefore, allowed and the impugned order is set aside.

12. Certified copy expedited.